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Supreme Court, U.S.
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Case No. 00-1938

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

LESTER L. WELLS,
Petitioner,

v.

MICHAEL W. MOORE, as Secretary of the
DEPARTMENT OF CORRECTIONS, State of Florida,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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A. REPLY TO THE STATE'S STATEMENT OF THE CASE AND FACTS

The question presented by Petitioner was: "Whether a trial judge has the obligation to disqualify retained counsel when presented with a conflict of interest which undermines the integrity of the trial proceedings and the defendant seeks to waive the conflict." The state, in its brief in opposition, first argued that the question Mr. Wells' presented in his petition was not properly subject for review by the Court because the question was not presented to, or passed upon, by the Eleventh Circuit Court of Appeals.

The issue raised by Petitioner Wells in his petition for writ of certiorari was raised before and addressed by the federal district court. The magistrate's report and recommendation specifically addressed the issue by noting that the "Petitioner claims that the public interest in maintaining the integrity of the judicial process required that the law firm be disqualified from further representation of petitioner, in spite of his consent, due

to the actual conflict of interest." (A-61).[1] Petitioner also argued at the district court level that disqualification of Petitioner's lawyer was necessary in order to protect public confidence in the justice system. (A-62). The same issue was raised again in the Eleventh Circuit Court of Appeals. The issue was set out in the Reply Brief of Appellant in support of the argument that the actual *Martinez*[2] conflict of interest inherent in the case could not have been waived by Petitioner Wells, for such a conflict of interest undermines the integrity of the judicial process and is not subject to waiver analysis. (A2-6-9).[3]

Next, the state argued that since both the state court and the lower federal courts resolved the question of whether an actual conflict of interest existed against the Petitioner, the

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[1] The symbol "A" followed by the appropriate number represents a citation to materials contained in the appendix to the Petition for Writ of Certiorari.

[2] *Martinez v. United States*, 630 F.2d 361 (5th Cir. 1980).

[3] The symbol "A2" followed by a number represents a citation to the materials contained in the attached appendix.

Court was not in a position to review those previously made factual determinations. The facts are not contested, only the legal conclusion drawn on those undisputed facts. The issue of an actual conflict of interest is a mixed question of law and fact. The Supreme Court of the United States may review the historical facts of record to reach the relevant and material issues of law.

B. ARGUMENT IN REPLY TO STATE'S BRIEF IN OPPOSITION

1. The question presented for review in the Petition for Writ of Certiorari was presented to the district court and the court of appeals; the Court has the discretion to review the question presented pursuant to 28 U.S.C. § 1254(1).

Petitioner raised in the district court and in the court of appeals the issue of whether a trial court has the obligation to disqualify retained counsel when presented with a conflict of interest which undermines the integrity of the trial proceedings,

as well as the public reputation of the judicial process, even if the defendant attempts to waive such a conflict. The magistrate, in his report and recommendation, addressed the issue of the public interest in the integrity of the judicial process. (A-61). In the report and recommendation, the magistrate noted that Petitioner argued that the trial court should have recognized that an actual conflict of interest existed and declined to accept the proposed waiver (A-62). That argument is the same argument Petitioner presented to the Court in his petition for writ of certiorari.

The fact that the court of appeals did not specifically address the issue in its opinion is not a ground requiring the Court to deny certiorari. Congress has provided in 28 U.S.C. § 1254(1), that the Supreme Court may review cases in the federal courts of appeals by "writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." The jurisdiction thus granted

is plenary in nature. *See Forsyth v. Hammond*, 166 U.S. 506, 511-13, 17 S.Ct. 665, 41 L.Ed. 1095 (1897). It extends to "any civil or criminal case" in the courts of appeals. There are no limitations as to the parties, the status of the case, or the amount in controversy. Nor are there any restrictions as to the matter at issue or the nature or form of the decision below. Even the fact that a court of appeals has ruled that its opinion not be published is no bar to Supreme Court review. *See Transamerican Freight Lines v. Brada Miller Freight Systems*, 423 U.S. 28, 34, 96 S.Ct. 229, 46 L.Ed.2d 169 (1975).

That the court of appeals denied a certificate of appealability as to this issue, (A-7), is not a bar to the Court exercising its discretion to grant certiorari review. *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed. 2d 242 (1998), [holding that the Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a court of appeals panel]. Therefore, even

though the Eleventh Circuit Court of Appeals did not specifically address the question presented in the petition for writ of certiorari, the Court has the discretion under § 1254(1) to grant review.

The second claim by the Respondent/state in its brief in opposition was that the question presented by Petitioner Wells required the Court to engage in a fact-finding analysis in order to resolve the issue. In a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel did not labor under a conflict of interest is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffective assistance of counsel is not a question of "basic, primary, or historical fac[t]," *Townsend v. Sain*, 372 U.S. 293, 309, n. 6, 83 S.Ct. 745, 755, n. 6, 9 L.Ed.2d 770 (1963). "Whether multiple representation in a particular case gave rise to a conflict of interest, [ ] is a mixed question of law and fact. *See Cuyler v. Sullivan*, 446 U.S., at 342, 100 S.Ct., at 1714."

Strickland v. Washington, 466 U.S. 668, 698; 104 S.Ct. 2052, 2070 (1984). While the Court may not be necessarily well suited to make factual determinations generally, as argued by the state, "[w]hen constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record." *Brookhart v. Janis*, 384 U.S. 1, 4, f.n. 4, 86 S.Ct. 1245, 1247, 16 L.Ed.2d 314 (1966). Petitioner Wells' constitutional right to conflict-free counsel is at issue in this proceeding.

The factual basis for finding that an actual conflict of interest existed below is set out in the Petition for Writ of Certiorari, and the Petitioner's attached appendix, sufficiently for the Court to make the preliminary decision to grant certiorari review. A more complete version of the facts may be supplied in a brief on the merits and supporting appendix. Importantly, the facts surrounding the conflict issue are not in dispute. There is no dispute that Petitioner's lawyer represented

him at the same time the same law firm represented the codefendant, a dismissed codefendant, and a state witness codefendant. The legal question is whether, upon the basis of the undisputed facts, an actual conflict of interest existed.

In Petitioner Wells' case, the undisputed facts are far more troubling than the facts in *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 S.Ct. L.Ed.2d 140 (1988). In *Wheat*, the district court was presented with an attorney who wished to represent three conspirators of varying stature in a complex drug distribution scheme. The government intended to call one of the potential clients, Bravo, as a witness for the prosecution at petitioner's trial. "The Government might readily have tied certain deliveries of marijuana by Bravo to petitioner, necessitating vigorous cross-examination of Bravo by petitioner's counsel." *Id.* at 163; 108 S.Ct. at 1699. The Court concluded that the attorney, because of his prior representation of Bravo, would have been unable to ethically

provide that cross examination. *Id.*

Petitioner Wells' lawyer represented him, a man he "knew was innocent." (R2-18).[4] Mr. Wells' lawyer simultaneously represented Jerry Wayne Weeks who (a) admitted his guilt to a fellow inmate, (R2-18) and, (b) was identified by two other eyewitnesses, "Bluegill" McCurdy and Joseph Wells. (R2-20). The same law firm simultaneously represented Anthony Weeks, brother of the codefendant, Jerry Wayne Weeks, who the firm was representing simultaneously in the Lester Wells trial, and convicted by a jury, but later was discharged on appeal. (A-15). Anthony Weeks was to be called as a witness for the state *against* Petitioner Wells. The firm also simultaneously represented Wilbur Weeks, whom eyewitness Joseph Wells (no relation to Petitioner) placed in the boat headed toward the crime scene. (R2-20). The conflict was present on this issue because counsel failed to cross examine

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[4] Record references to *Weeks v. Moore*, Eleventh Circuit Case No. 00-12781-HH.

the eyewitnesses in a manner that implicated Wilbur Weeks, but which would have provided existing exculpatory evidence for Petitioner Wells.

Petitioner Wells requests the Court grant certiorari in order to extend the analysis begun in the *Wheat* decision. Trial courts need guidance deciding when, if at all, they should exercise their inherent discretion to disqualify counsel, even against the purported wishes of the defendant. If allowing the representation would result in inadequate representation or affect the integrity of the trial in a negative way, a conflict of interest must result in disqualification of counsel. For this reason, the Court should grant review.

Respectfully Submitted,

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APPENDIX TO REPLY BRIEF IN OPPOSITION

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IN THE

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

LESTER L. WELLS, Appellant, v. MICHAEL W. MOORE, as Secretary, Florida Department of Corrections Appellee.	Habeas Corpus Appeal from the Northern District of Florida

REPLY BRIEF OF APPELLANT

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D. ARGUMENTS AND CITATIONS OF AUTHORITY

1. The actual *Martinez*[5] conflict of interest inherent in the case of Petitioner Wells could not have been waived by the Petitioner, for such a conflict of interest undermines the integrity of the judicial process and is not subject to waiver analysis.

The report and recommendation adopted by the district court addressed solely whether a *Garcia*[6] conflict of interest arose and whether Petitioner Wells had waived the *Garcia* conflict. The court below did not distinguish the fundamental difference between *Garcia* and *Martinez* conflict. A Garcia conflict raises antagonistic defenses and is subject to waiver. A *Martinez* conflict of interest, under which counsel represents a criminal defendant and a witness for the prosecution

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[5]*Martinez v. United States*, 630 F.2d 361 (5th Cir. 1980).

[6]*United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975).

simultaneously in the same proceeding, cannot be waived by the defendant. The integrity of the judicial process is undermined by the joint representation because the defense counsel controls the content of the prosecution's case by advising his prosecution witness/client to refuse to testify. The seriousness of this type of dual representation is heightened, because an attorney "inherently encounters divided loyalties."[7] *Porter v. Singletary*, 14 F.3d 554, 561 (11th Cir. 1994); *Lightbourne v. Dugger*, 829 F.2d 1012, 1023 (11th Cir. 1987); *Stephens v. United States*, 595 F.2d 1066, 1070 (5th Cir. 1979). Not only did Petitioner Wells' attorney represent a witness who was called by the state (Anthony Weeks), counsel also represented a witness for the state whom they were advising to exercise Fifth Amendment rights (Jerry Weeks).

Because the conflicts are often subtle, it is not enough for a judge to rely upon counsel, who may not be totally

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[7]The state's witness Anthony Weeks was a *current* client of cross-examining counsel.

disinterested. *United States v. Wheat,* 813 F.2d 1399, 1403 (9th Cir. 1987) [quoting *United States v. Lawriw,* 568 F.2d 98, 104 (8th Cir. 1977), *cert. denied,* 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed. 2d 60 (1978)]. The lawyer is operating under an actual conflict of interest, and the lawyer is not in a position to advise a defendant of what to waive under those conditions.

The Eleventh Circuit Court of Appeals has effectively summarized: the right to counsel of one's choice is not absolute. The right does not override the broader societal interests in the effective administration of justice ... or in the maintenance of "public confidence in the integrity of our legal system." ... But the right yields only to broader societal interests, and it cannot be denied by a court unilaterally as a means to protect other Sixth Amendment rights of a defendant. *In re Paradyne Corp.,* 803 F.2d 604, 611 (11th Cir. 1986) n. 16 (citations omitted). *See also United States v. Diozzi,* 807 F.2d 10, 12 (1st Cir. 1986) (district court has some discretion to limit

the exercise of the right to counsel of choice when insistence upon it would interfere with the orderly administration of justice). The court may have to reach out and protect the defendants from themselves when, under all the circumstances, the court finds that the balance of the interests involved require disqualification. *See United States v. Dressel,* 742 F.2d 1256, 1258 (10th Cir. 1984): "Notwithstanding the trial court's compliance with all of the suggested procedures to ensure that any waiver is fully informed and voluntary, under some circumstances 'even full disclosure and consent ... may not be an adequate protection.'" (*Quoting* Fed.R.Crim.P. 44(c) advisory committee's note).

Petitioner Wells' federal due process right to a fundamentally fair trial was violated by the state court system that failed to disclose and explain the actual conflict of interest under which the representing law firm labored. The state court system further violated Petitioner Wells' right to conflict-free

counsel through the failure of the trial court to take remedial action by disqualifying counsel from the further representation of Petitioner Wells. The public interest in a fundamentally fair proceeding outweighed the right of Petitioner Wells to the counsel of his choice. Assuming *arguendo,* that Petitioner Wells, in fact, waived a conflict, he could not fully understand or appreciate what he was waiving because counsel and the state court did not fully understand the differences sufficiently to explain the law and obtain a valid waiver.

A waiver of the right to counsel must not only be voluntary, but must also be knowing and intelligent, with sufficient awareness of the relevant circumstances and likely consequences. *United States v. Akinseye,* 802 F.2d 740, 745 (4th Cir.1986) [*quoting Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970)], *cert. denied*, 482 U.S.916, 107 S.Ct. 3190, 96 L.Ed.2d 678 (1987). If the trial judge specifically admonishes the defendants of the

potential for future conflict and the defendants knowingly, intelligently and voluntarily waive the right of separate representation, the law requires nothing more, *United States v. Williams,* 809 F.2d 1072, 1085 (5th Cir.1987), and the waiver will insulate a conviction from later attack. *United States v. Flanagan*, 679 F.2d 1072, 1076 (3d Cir.1982), *rev'd on other grounds*, 465 U.S. 259, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984). The standard for measuring an effective waiver of a constitutional right such as effective assistance of counsel is that a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *United States v. Cirrincione*, 780 F.2d 620, 624 (7th Cir.1985) [*quoting Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed.

1461 (1938)].

Under the facts of record in this case, no effective waiver of the *Martinez* conflict occurred, nor could a waiver have been tendered by Petitioner Wells because he did not have a full understanding of the nature of the conflict. Neither the state court judge, nor counsel, had an adequate understanding of the issue. The judge only explained a potential conflict of defenses. Even the Magistrate judge did not fully appreciate the differences, as he discussed the issue of waiver under similar considerations. If a court has the authority to disqualify the counsel of choice despite and contrary to the consent or objection of the defendant, then the trial court bears the responsibility to disqualify counsel of choice despite the purported consent of the defendant to a conflict of interest.

Because Petitioner was represented by counsel who simultaneously represented a witness for the state, a witness who refused to testify, a codefendant, and the

defendant/petitioner Wells, an actual conflict of interest existed. The conflict of interest was not waivable. Any purported waiver was constitutionally insufficient. Relief should be granted.

E. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Douglas T. Squire
Assistant Attorney General
Department of Legal Affairs
PL01, The Capitol
Tallahassee, Florida 32399-1050

by hand/mail delivery this 09th day of October, 2000.

Respectfully submitted,

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